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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

VERNON MCKINNEY et al., Plaintiffs and Appellants, v. RAVI SANWAL et al., Defendants and Respondents.	C085364 (Super. Ct. No. STK-CV-UMT-2016-0009879)

The Adobe Hacienda Apartments consist of 171 residential units in 12 buildings (plus a pool house) on three contiguous parcels. The apartments are owned by defendants Ravi and Manita Sanwal (sued individually and as trustees of their living trust, collectively Sanwal). The City of Stockton (the City), not a party, brought code enforcement actions and issued abatement orders based on inspections allegedly revealing shoddy conditions.

Plaintiffs, former tenants Vernon McKinney, Theresa Hillman, and Brittani Silva (collectively McKinney) sued. They alleged in part that Sanwal collected rent during a statutory period while failing to remedy the problems and charged excessive late fees.

McKinney appeals from an order denying class certification. The appeal lies. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 112, pp. 175-176.)

Generally speaking, McKinney contends the trial court considered improper factors, improperly weighed the merits of the alleged claims or defenses in its ruling, and gave insufficient (or no) consideration to the benefits class certification would confer on the parties and the judicial system. We disagree and shall affirm the order denying class certification.

BACKGROUND

We summarize the facts before the trial court when it exercised its discretion in ruling on McKinney's motion for class certification.

The Complaint and Class Certification Motion and Opposition

McKinney alleged that the City's inspections of the apartment complex resulted in hundreds of code violations in 2015, some of which were serious or "habitability" violations. Sanwal sued the City in response to the City's enforcement actions, and in February 2016 the City entered into a settlement with Sanwal that in part agreed all alleged violations had been resolved; the City then filed a notice of "compliance and satisfaction" covering the apartments. As relevant herein, McKinney's suit is predicated on Sanwal's collection of rent after a statutory period Sanwal had to remedy the alleged habitability violations; it is also based on Sanwal's policy of charging allegedly unlawful late fees, an identical flat $75 fee for each unit. The complaint explicitly excluded damages for violations occurring solely within units; it was limited to violations pertaining solely to "common" areas.

The class certification motion did not embrace all the theories in the operative complaint. It proposed a "rent damages" class and a "late fee" class. The rent damages

class would consist of all current and former tenants from whom Sanwal "collected rents *after* the statutory abatement-compliance deadline, in violation of Civil Code § 1942.4."[1] The late fee class would consist of current and former tenants who paid excessive late fees during a defined period.

Sanwal in part argued that none of the evidence submitted by McKinney showed that any plaintiff had ever actually *paid* a late fee, pointing to deposition testimony by Sanwal that late fees were routinely waived or credited toward rent. As for the proposed rental damages claim, Sanwal pointed to evidence that because of the configuration of the complex, different units had different access to different alleged "common" areas, therefore individualized litigation of how each plaintiff was impacted by alleged defects would be necessary; in other words, there were few if any common issues of fact. Class certification would not benefit the parties or the court, because there were substantial individualized issues to be determined; therefore, the case was more suitable to a regular multiple-plaintiff action or consolidated actions.

McKinney's reply included additional evidence, in particular declarations from six tenants (the three plaintiffs and three tenants deposed during discovery), describing various issues with their own units and alleged common areas.[2] Only two claimed to have paid late fees (Weber and Tellez), and on this point they partly pointed to records

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[1] Further undesignated statutory references are to the Civil Code.

Generally, section 1942.4 precludes the collection of rent if a unit lacks certain qualities, including if a specified public official has ordered abatement of substandard conditions (*other* than ones caused by tenants) and those conditions have not been corrected within a specified time.

[2] When Sanwal objected to this evidence, McKinney argued it arose during discovery sought by Sanwal. The trial court continued the matter to give Sanwal a chance to address this evidence. Other declarations McKinney had presented earlier had been withdrawn by agreement of the parties.

obtained from Sanwal. McKinney argued it would be a simple matter to examine Sanwal's records to determine which other tenants paid late fees and only those who had would be entitled to a refund. If the fact that none of the named plaintiffs were still tenants posed a procedural problem, the reply proposed three current tenants (Weber, Tellez, and Golson) who were willing to step in and litigate the case on behalf of the relevant classes.[3]

Sanwal's supplemental opposition in part argued the rent damages class was still not viable. First, the statute (§ 1942.4) did not contemplate aggregating citations regarding multiple buildings into one over-arching habitability claim to an entire complex, it "applies to specific dwellings and calculates violations of its terms based on the specific date [a notice of violation] is issued." Second, although the complaint purported to exclude problems that existed solely within individual units, the term "common area" was not defined, and given the layout of the complex, each tenant's access to (and use or potential use of) any specific common area would vary greatly. Sanwal argued that "individualized determinations" unique to each plaintiff abounded, such as how long she or he was a tenant, which if any of the alleged common problems affected areas near that tenant's unit (and at least impliedly, whether that tenant would have used a particular alleged "common" feature of the complex) and the degree of harm (if any) suffered by each tenant for the lack of use of any particular common area or areas deemed to be substandard.

As for the proposed late fee class, Sanwal claimed McKinney kept changing his characterization about whether the class was to be composed of tenants who *paid* the late

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[3] These six declarations on which the motion was largely based generally claimed that the common area violations included pervasive debris, filth and cockroach and rodent infestations (which also existed within individual units), defective doors, latches, fencing and lighting, and algae in a swimming pool.

fee or all tenants who simply had the flat late fee in their agreements. In somewhat confusing deposition testimony, Tellez indicated that late fees were charged but credited back to her. Weber had testified in her deposition that although her husband had better knowledge of the family finances than she did, at least twice late fees were credited back, though a full reading of her deposition indicates she had testified she had been charged "several" late fees.[4]

McKinney's surreply argued that any uncorrected (or belatedly corrected) defects in the common areas raised "common fact issues" in the case, as did the presence of the purportedly excessive late fee, and the court should not weigh the strength of the evidence of these claims in ruling on class certification, but merely determine if they raised facts common to each member of the relevant class. Based in part on Sanwal's deposition, McKinney argued he had common "premises-wide" business practices (that is, "All 12 buildings . . . are operated as an integrated complex with shared common areas") and this militated in favor of class certification, as did the evidence from the six deponents who (in McKinney's view) described similar premises-wide problems within the apartment complex as a whole. As for late fees, McKinney argued it was irrelevant "whether they were waived for some and not for others" and the court would simply decide whether the late fee was excessive and then Sanwal's records would indicate who was entitled to a refund and who was not.

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[4] The amended notice of the motion for class certification and the amended memorandum in support of the motion (and McKinney's reply) defined the proposed late fee class as those people "who paid" the late fee. The reply and surreply filed by McKinney suggested the purported illegality of the flat fee itself, to show that it would be easy to find out *who paid* the late fee. But the trial court was never asked to certify a class of all tenants whose leases merely *included* the purportedly excessive flat late fee. On appeal McKinney subtly redefines the proposed class to include persons "from whom 'late fees' *were charged*," (italics added) which appears to be an effort to embrace those persons whose late fees were waived or credited. This suggested class definition comes too late.

The Ruling

The trial court's detailed written ruling recounted the above in some detail and made some evidentiary rulings not relevant on appeal. The court headed and discussed each relevant factor substantially as follows:

1. *Ascertainability and Numerosity*

The trial court found the rent damages class was ascertainable and numerous, given the number of units in question and the fact that Sanwal's business records would show who lived where and when. But there were problems with ascertaining the late fee claim, apart from the shifting characterization of that class. Sanwal's records did not support Tellez's claim that she ever paid a late fee, rather it was "credited" to her account, and both Tellez and Weber had testified in deposition that late fees had been waived or credited to their accounts. The court found the proposed late fee class was neither readily ascertainable nor numerous.

2. *Commonality of Issues (Fact and Law)*

As for the rent damages class, the trial court pointed out that the statute relied on by McKinney (for purposes of class certification) provided for damages when substandard conditions "were not caused by an act or omission of the tenant" (§ 1942.4, subd. (a)(4)), and other statutes (§§ 1929, 1941.2) require tenants to exercise care in the use of rented property and imposed a duty to keep a rented property reasonably clean. The court noted there was "an array of conditions" at the complex revealed by the City's notices of violation, covering three separate parcels and multiple buildings. Considering cockroach infestations (partly citing evidence tendered by Sanwal's expert), the court reasoned that any particular tenant's sanitary practices and level of cooperation with complex-wide cockroach eradication efforts would create "individualized problems of proof . . . that defeats commonality" as to this issue. The court added that a section 1942.4 claim raises "an individualized inquiry, even if the inquiry is focused solely on the common areas, because the practices of a tenant may contribute to the dilapidation. The

defense . . . will require an individual assessment of the tenant's living style." The court found individualized inquiries were also required to address other claims because "[t]he code violations involving the common area[s] do not affect all the tenants in the same manner or to the same degree," which would implicate the pleaded nuisance, premises liability, general negligence, and breach of contract theories outlined in the complaint (but outside the scope of the class certification motion), thus there was no commonality of proof militating in favor of class certification.

3. *Substantial Benefit*

Pointing out that the purpose of a class action is to eliminate the possibility of repetitious litigation, the trial court found that recognition of the rent damages class would in essence "be adjudicating only half of each [tenant's] case and requiring more litigation (and expenditure of both Court and tenant's resources) if the tenants wish to pursue Defendants for the conditions within their respective units."

4. *Conclusion*

The trial court denied the motion, summarizing its reasoning as follows:

> "The proposed Late Fee Class lacks ascertainability and numerosity. The proposed Rent Damages Class lacks commonality in law and fact; more particularly, there was no showing that common issues predominate. Moreover, there is no substantial benefit for certifying the classes."

Order and Appeal

McKinney timely appealed from a notice of the order denying certification.[5] We later granted McKinney's unopposed request for judicial notice of the complaint and the settlement in Sanwal's suit against the City.

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[5] We note McKinney did not appeal from a contemporaneous discovery order that became the subject of later proceedings in the trial court.

DISCUSSION

I

Standards of Review and Class Certification

Our Supreme Court has described the proper standard of review from an order on a class certification motion as follows:

"We review the trial court's ruling for abuse of discretion and generally will not disturb it ' "unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions." ' [Citation.] We review the trial court's actual reasons for granting or denying certification; if they are erroneous, we must reverse, whether or not other reasons not relied upon might have supported the ruling. [Citation.]" (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 530.)[6]

One good stated reason for denying certification is sufficient, and we must review the evidence in the light favorable to the trial court's order. (See *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1022 (*Brinker*); *Sav-On Drugs Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327, 329 (*Sav-On*); *Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal.App.4th 133, 143 (*Soderstedt*).)

As for class certification, our high court has "articulated clear requirements for the certification of a class. The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives. [Citations.] 'In turn, the "community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives

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[6] This standard of review "presents an exception to the general rule that a reviewing court will look to the trial court's result, not its rationale." (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 314(3), p. 432.)

who can adequately represent the class." ' [Citations.]" (*Brinker*, *supra*, 53 Cal.4th at p. 1021.)

"The certification question is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious.' [Citation.] A trial court ruling on a certification motion determines 'whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' [Citations.]" (*Sav-On*, *supra*, 34 Cal.4th at pp. 326.)

But this does not mean the trial court always must ignore the merits of the case:

> "A class certification motion is not a license for a free-floating inquiry into the validity of the complaint's allegations; rather, resolution of disputes over the merits of a case generally must be postponed until after class certification has been decided [citation], with the court assuming for purposes of the certification motion that any claims have merit [citation].
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> "We have recognized, however, that 'issues affecting the merits of a case may be enmeshed with class action requirements . . . .' [Citations.] When evidence or legal issues germane to the certification question bear as well on aspects of the merits, a court may properly evaluate them. [Citations.] The rule is that a court may 'consider[] how various claims and defenses relate and may affect the course of the litigation' even though such 'considerations . . . may overlap the case's merits.' [Citations].
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> "In particular, whether common or individual questions predominate will often depend upon resolution of issues closely tied to the merits. [Citations.]" (*Brinker, supra,* 53 Cal.4th at pp. 1023-1024.)

Phrased another way, "a trial court must examine the plaintiff's theory of recovery, assess the nature of the legal and factual disputes likely to be presented, and decide whether individual or common issues predominate. To the extent the propriety of certification depends upon disputed threshold legal or factual questions, a court may, and indeed must, resolve them." (*Brinker, supra,* 53 Cal.4th at p. 1025.)

II

The Proposed Late Fee Class

The trial court found the proposed late fee class was "neither ascertainable or sufficiently numerous." Accordingly, the court did not reach the other factors relevant to the propriety of certification of this proposed class.

McKinney contends the trial court misunderstood or at least misapplied the "ascertainability" factor, and contends it would have been relatively easy to find out who actually paid late fees by examining Sanwal's own business records.

We first emphasize that the trial court found McKinney had been inconsistent in defining the proposed class, describing it as people who *paid* purportedly excessive late fees, but then characterizing it to include all tenants whose leases merely *included* the late-fee provision. The court's ruling focused on the former class, as proposed by the motion for certification itself, rather than the latter class. We agree that the class proposed by the motion (and never formally sought to be amended) was the correct class to consider.

The trial court could rationally find on the evidence in this record that very few--if any--tenants had actually *paid* late fees (that is, paid them without thereafter being credited for those amounts on their account ledgers). We do not accept McKinney's view that the court improperly considered the merits or improperly weighed evidence on this issue. Instead, the court could rationally find that McKinney had not carried *his* burden, as the party seeking class certification, to show numerosity of this proposed class. That was sufficient to deny class certification. (See *Soderstedt*, *supra*, 197 Cal.App.4th at p. 154 ["the trial court accurately observed that appellants proffered no evidence to support their allegation that there were 146 putative class members"].)

Within his briefing McKinney interweaves many claims regarding the discovery order made on the same date as the class certification denial order, essentially arguing that if that discovery order had been different, or if the timing of the two rulings had

differed, more late fee class members likely would have been found. But McKinney did not appeal from the discovery order, and generally, we "review a trial court's ruling based on the facts known to the trial court at the time of the ruling." (*People v. Cervantes* (2004) 118 Cal.App.4th 162, 176; see *Vons Companies, Inc. v. Seabest Foods, Inc*. (1996) 14 Cal.4th 434, 444, fn. 3.) As just explained, the court could find the evidence about numerosity regarding late fees was not substantial.

Accordingly, even if the trial court was mistaken about the "ascertainability" of this proposed class, that would not undermine the validity of the alternate ground (lack of numerosity of the proposed class) as found in the court's written ruling.[7]

III

The Proposed Rent Damages Class

The trial court found the proposed rent damages class (that is, who lived in which units during what time periods) was ascertainable by reference to Sanwal's business records and was numerous enough to militate in favor of certification. We agree. (See *Rich v. Schwab* (1984) 162 Cal.App.3d 739, 744.)

As for commonality of fact and law, the court noted that McKinney's claim ultimately required him to prove that the defective conditions "were not caused by an act or omission of the tenant or lessee" (§ 1942.4, subd. (a)(4)), and that McKinney had not addressed that point appropriately in his moving papers. The court found "a violation of Civil Code, section 1942.4 is an individualized inquiry, even if the inquiry is focused solely on the common areas, because the practices of a tenant may contribute to the dilapidation. This defense -- available to Defendants for this type of violation -- will require an individual assessment of the tenant's living style." Even in his reply brief,

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[7] For a similar reason, we reject McKinney's claim that the trial court did not analyze the potential benefits and burdens of class certification as to the late fee class. If there was no significant class to certify, there was no need to conduct such an analysis.

McKinney merely quarrels with the trial court's view about this element of *his* cause of action (namely, providing that a violation was *not* caused by a tenant), but offers no coherent legal refutation thereof.

The court was not purporting to *adjudicate* that issue, as McKinney's briefing suggests, it was considering the contours of the proposed class action. And the claim that this issue was not properly raised in the trial court is incorrect; it was discussed in the tentative ruling and at the hearing on the motion.

The court then referenced evidence from defendant's expert outlining some of the differences in the three different parcels, the 12 different residential buildings, and related areas; the expert had also described the reluctance or refusal of some tenants to provide access to units for inspection. Regarding cockroaches, the court found in part that each tenant's "personal living practices and habits" could be relevant to liability, and the same could be said regarding "the accumulation of junk and debris throughout the property, the condition of lighting fixtures." The court was not adjudicating contributory liability or failure of proof by any tenants, but was merely pointing out that each tenant's claim would likely involve considering these defensive points, which likely would differ for each tenant.[8]

In other words, the court found these kinds of alleged "common area" defects did not involve entirely common issues of fact or law. In contrast, for example, a case involving an apartment complex that lacked legally required features not hinged on a tenant's conduct (for example, the provision of potable and hot water as required by

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[8] Although McKinney mentions the possible use of subclasses in his briefing, he does not coherently argue how the trial court abused its discretion in this regard or even contend that he proposed any such subclasses be certified as an alternative remedy. Thus, we decline to address this issue.

§ 1941.1, subd. (a)(3)) would not involve defenses personal to particular tenants, as those defects would make the unit "untenantable" as a matter of law.

But *this* suit (insofar as the class certification motion was concerned) is based on a different section that incorporates as an element of the cause of action itself that the tenant *not have contributed* to the problem. (§ 1942.4, subd. (a)(4).) Without adjudicating the merits, the trial court found this injected "individualized" issues into the case "that defeats commonality for this cause of action."[9] Our Supreme Court has quoted with approval a commentator who explained " 'what really matters to class certification' is 'not similarity at some unspecified level of generality but, rather, *dissimilarity that has the capacity to undercut the prospects for joint resolution of class members' claims through a unified proceeding*.' [Citation.]" (*Brinker, supra,* 53 Cal.4th at p. 1022, fn. 5, italics added.) Given the multiple buildings with different notices of violation and different locations within the complex for each unit, as well as issues regarding each tenant's own conduct, we find no abuse of discretion in the court's conclusion that the dissimilarities were too great in this case.

To the extent McKinney contends the trial court did not consider the benefits to the litigants and the court from class certification, we disagree. The court quoted pertinent authority on this point and repeatedly referenced it in discussing the contentions of the parties. Further, under a "Substantial Benefits" heading, the court explicitly found that certifying the rental damages claim would not eliminate repetitious litigation but

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[9] Although the class certification motion was not based on all theories (or purported "causes of action") stated in the complaint, as McKinney's counsel emphasized at the trial court hearing, the trial court discussed those theories (e.g., nuisance) in its written ruling in the course of illustrating that class certification would not likely result in a net benefit to the judicial system or to the respective litigants. McKinney heads a portion of his brief addressing some of these theories. But because the proposed class liability did not rest on these theories we see no reason to address them separately, except to note they were essentially derivative.

would likely result in "more litigation (and expenditure of both Court and tenant's resources) if the tenants wish to pursue" damages based on flaws solely within their individual units. That was a rational and supportable finding based on the claims and defenses raised, the evidence tendered, and the probable tactics to be expected by both parties to the litigation.

DISPOSITION

The order denying class certification is affirmed. McKinney shall pay Sanwal's costs of this appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

/s/
Duarte, J.

We concur:

/s/
Butz, Acting P. J.

/s/
Mauro, J.